

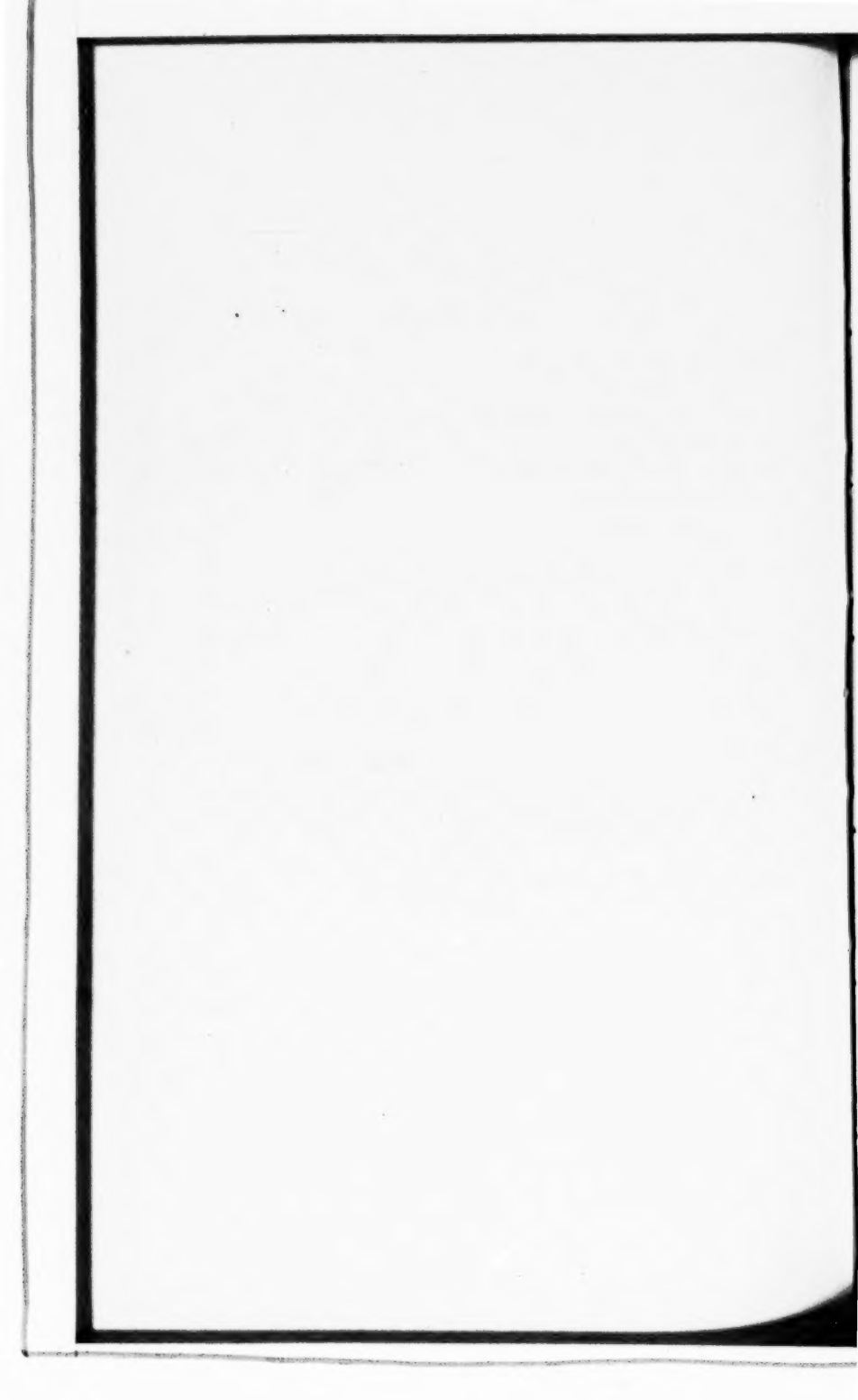
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 655

ARCHIE FINCH AND NANCY FINCH,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Archie Finch and Nancy Finch, respectfully pray that Writ of Certiorari issue to review a decision of the Supreme Court of the State of Illinois, affirming the judgment and conviction of the Petitioners in the Circuit Court of Saline County in the State of Illinois of Larceny, by which affirmance by the Supreme Court of the State of Illinois the sentence of the Circuit Court of Saline County, Illinois, of imprisonment in the penitentiary for a period of One (1) year, was affirmed by the Supreme Court of Illinois.

Short Statement of the Case

Petitioners were indicted in the Circuit Court of Saline County, Illinois, on February 13, 1945, on a charge of Larceny. They were indicted jointly together with one Delmas Leverett, a white woman. Archie Finch is a colored man, and Nancy Finch, his wife, is a white woman. They were jointly charged with the Larceny of money from the person of one Guy Turner. The People attempted to show that Delmas Leverett, the white woman, had taken Guy Turner, when intoxicated, from a tavern to the home of the Finches, and sometime before the following morning, stole the money from the person of the drunken Turner. Delmas Leverett was granted a separate trial and has never been brought to trial.

Immediately after the arrest of all the Defendants, the Petitioners signed separate written statements which were held out by the People to be confessions, although the statements do not admit guilt of the crime of Larceny.

Petitioners are poor and ignorant, and were originally represented by an elderly Member of the Saline County Bar who was physically unable to defend them (R. 5, 6). On April 5, 1945, the Trial Court appointed Arlie O. Boswell, an Attorney of that Bar, to defend the Petitioners because of their indigence.

A Motion was made to Quash the Indictment which was overruled. A Motion was made to Impound certain monies alleged to have been seized on illegal search and ultimately sustained. A Motion was made for a Bill of Particulars which was denied.

On September 19, 1945, a Motion was made for a Continuance on the ground of the absence of Willie Bevins, a wit-

ness, and Ollie McClure, an absent witness. The Motion was granted unless the People agreed that the absent witnesses would testify as set out in the Motion; this the People stipulated, and the trial proceeded.

The trial lasted for two days, and resulted in verdicts of guilty. The Attorney appointed to defend Petitioners was indulging in intoxicants all during the trial and his conduct culminated at the time the verdict was returned on September 21, 1945, in the Trial Court ordering the Appointed Attorney physically removed from the Court room by the Sheriff and confined in the County Jail (R. p. 15).

Prior to the commencement of the trial, Petitioners through Counsel made a Motion for the Suppression of Certain Monies alleged to have been illegally seized. The Court reserved a ruling until such monies were offered in evidence by the People, at which time the Court sustained the Motion to Suppress.

The People in the presentation of their case in Chief introduced the two written statements of Petitioners purporting to be confessions and had them identified by the testimony of a Deputy Sheriff. The People then continued in the presentation of their case in Chief by proving by the testimony of a Deputy Sheriff that Petitioners made oral statements at other times different from the import of the written statements in an effort to impeach the written statements which had been introduced by the People in Chief.

The only objection to this presentation of proof offered by the Appointed Attorney for Petitioners was (R. p. 32) an attempt at sarcasm to the effect that the statements seemed to have been made in the office of the Assistant State's Attorney rather than the office of the State's Attorney.

At another time, when the Deputy Sheriff was being examined with the jury excused at the request of the Appointed Attorney, the jury was brought back in to hear this proof at the suggestion of the Appointed Attorney even though he had been the one who properly asked that the jury be excused and the proof taken first out of their hearing (R. p. 29).

In the examination of the same Deputy Sheriff, the Court permitted the People to introduce testimony concerning the monies illegally seized although the Court had ruled that such testimony was improper. The Appointed Attorney sat mute and permitted this improper testimony to be introduced without objection, and the Trial Court did not see fit to continue its first ruling; and the Supreme Court of the State of Illinois on appeal held (R. p. 11), that no objection could be later raised because the Appointed Attorney raised no objection at the time. At another stage of the trial, in the examination of the same witness, when the witness had been turned over to the Appointed Attorney for cross-examination, he attempted to examine the witness in Chief (R. p. 30), and took the position that he could make the witness his own witness at the time.

Immediately prior to the trial, when the Appointed Attorney had made a Motion for Continuance because of the absence of the witnesses, Willie Bevins and Ollie McClure, the Motion had set out the testimony of the witnesses. The Trial Court ruled that a continuance would have to be granted unless the People admitted that the absent witnesses would testify to the facts set out in the Motion if present, and such testimony be introduced in the trial. The People made such agreement. However, the Appointed Attorney did not at any time introduce the Motion containing the testimony of Willie Bevins and Ollie McClure in evidence, and it was not submitted to the jury.

The Appointed Attorney for the Petitioners did not permit either of them to take the witness stand in their own behalf, and at the close of the introduction of testimony for all parties, Counsel submitted written instructions to the Court to be given to the jury. The Appointed Attorney offered one instruction in triplicate (R. pp. 48, 49). The Trial Court changed one word in the first of the triplicate instructions and gave it.

The trial resulted in sealed verdicts of guilt which were opened in open Court, at which time the Appointed Attorney was ordered to be removed from the Courtroom and confined in the County Jail because of intoxication.

The next proceeding was on October 12, 1945, when there was filed for Petitioners Motions for New Trial and in Arrest of Judgment. These were filed for Petitioners by the same Appointed Attorney who had been forcibly ejected from the trial at the last proceeding. Neither the Motion for a New Trial nor the Motion in Arrest of Judgment included any reference to the erratic behavior of the Appointed Attorney during the trial, but the Motion in Arrest of Judgment did include (R. p. 52):

"3. That because of the racial differences of the two defendants they were highly prejudiced by the jury, and that the jury did not base its verdict upon the facts presented in said cause but were so highly prejudiced against the defendants that the prejudice of the defendants was the sole cause of the verdict of guilty against them."

Subsequent representation of Petitioners has been by Counsel appearing in this court.

B

The Pleadings

The Pleadings in the Trial Court in the cause consist of the Indictment, the Motion to Quash the Indictment, the Motion for a Bill of Particulars, Motions for Continuances at the April, and the September Terms, 1945, Motion to Suppress Monies, Motion for a New Trial, and Motion in Arrest of Judgment.

Errors assigned by Petitioners in prosecuting their Writ of Error to the Supreme Court of Illinois were as follows :

“that the Trial Court erred in denying the Motion to Quash the indictment; it erred in overruling the Motion for a Bill of Particulars; it erred in permitting the People to introduce evidence of purported parole statements of Plaintiffs in Error in an effort to impeach the People’s own testimony consisting of the written statements of Plaintiffs in Error; it erred in permitting the introduction by the People of other improper evidence; it erred in denying the Motion for an instructed verdict; it erred in giving improper instructions on behalf of the People, and particularly People’s instruction No. 3; it erred in denying the Motion for a New Trial; it erred in denying the Motion in Arrest of Judgment; it erred in permitting the verdict to stand because the People failed to prove the commission of a larceny by any person as a principal, without which these Plaintiffs in Error could not be convicted as accessories before the fact; it erred in permitting the verdict to stand as the verdict is manifestly against the weight of the evidence; it erred in allowing the verdict to stand inasmuch as the People failed to prove beyond a reasonable doubt that the Plaintiffs in Error were guilty in manner and form charged in the Indictment.”

Point XIII urged by Petitioners in the Supreme Court of Illinois was that:

"The rights of a person accused of crime to a fair and impartial trial according to the recognized rules of law and procedure, and to be represented by Counsel, is not a mere formality but is a substantial part of the law of the land."

"The Trial of a person on a felony charge is not an informal matter and should not be so treated; it is a serious inquisition and should be conducted in accordance with the rules of the Court and in keeping with its dignity. Whether there was such an agreement as would justify the lack of alertness on the part of Counsel for the defendant, the result was the same. For this disregard of established rules, the Assistant State's Attorney was equally to blame."

C

Verdict

Upon the cause being tried and submitted to a jury, separate verdicts of guilt were returned as to Each Petitioner, and following the denial by the Court of a Motion for New Trial and in Arrest of Judgment, the Court imposed sentences of One (1) Year in the Penitentiary upon each Petitioner. A Motion for Stay of Execution for 60 days was granted; and the Petitioners admitted to bail in the amount of \$1,500.00 pending appeal to the Supreme Court of the State of Illinois.

The Opinion of the Supreme Court, State of Illinois

The Petitioners having perfected their appeal to the Supreme Court of the State of Illinois, the same was considered by that Court on printed briefs and arguments and taken under advisement until May 21, 1946, when the Supreme Court of the State of Illinois rendered its opinion affirming the judgment, conviction, and sentence of the Circuit Court of Saline County.

Rehearing

A Petition for Rehearing was aptly filed, but was denied by the Supreme Court of the State of Illinois, by its order of September 12, 1946.

II

Statement of Matters Involved and the Reasons Relied On for the Allowance of the Writ

The discretionary power of this Court to grant Writ of Certiorari is invoked on the following grounds:

(First) The decision of the Supreme Court of the State of Illinois denies to the Petitioners the right not to be deprived of their liberty without due process of law, and their right not to have denied them the equal protection of the laws as defined and granted by the Constitution of the United States, Amendment XIV, Section 1 (Bill of Rights), and by the Constitution of the State of Illinois, Article II, Section 2.

The holding of the Supreme Court of the State of Illinois renders nugatory the provisions of the Bill of Rights of the Federal Constitution and the Constitution of the State of Illinois granting to the Petitioners the rights of not being deprived of their liberty without due process of law and the right to the equal protection of the laws, and is in conflict with the decisions of the following cases:

Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 65;

Hebert v. State of Louisiana, 272 U. S. 312, 47 S. Ct. 103, 104;

Brown v. State of Mississippi, 297 U. S. 278, 56 S. Ct. 461, 465;

Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472, 478.

Conclusion

Wherefore, your Petitioners pray that the Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding said court to certify and send to this Court, a full and complete Transcript of the Record and of the proceedings of the said Supreme Court of the State of Illinois had in the case Numbered 29,370, and entitled People of the State of Illinois vs. Archie Finch and Nancy Finch, to the end that the decision and judgment of the said Supreme Court of the State of Illinois be reviewed and determined by this Court as provided by the laws of the United States; and that the judgment herein of the said Supreme Court of the State of Illinois be reversed by this Court and for such further relief as this Court may deem just and proper.

ARCHIE FINCH AND NANCY FINCH,

Petitioners.

By SCERIAL THOMPSON,

Their Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion of the Supreme Court of the State of Illinois appears in full in the record (R. 60-66). No formal opinion was rendered by the Circuit Court of Saline County, Illinois.

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925, Section 344 (b), Title 28, U. S. C. A.

Dates of Judgment

The judgment of the Supreme Court of Illinois was rendered May 21, 1946.

The order denying rehearing was dated September 12, 1946.

III

Statement of Case

Inasmuch as there has been hereto submitted in the Petition a short statement of the case, and a statement of the pleadings, Petitioners desire in this instance merely to concisely and tersely relate to this Court the occurrences that amounted to a denial to them of due process of law.

The Petitioner, Archie Finch, a colored man, and Petitioner, Nancy Finch, a white woman, husband and wife, were poor and ignorant people indicted on the charge of committing a felony contrary to the laws of the State of

Illinois. In accordance with the mandate of the law, the Trial Court appointed Counsel for them. The Attorney appointed was a Member of the Bar of the Trial Court and all his acts and doings under such appointment were either done or omitted within the presence of the Trial Court making the appointment.

Briefly, these acts or omissions are summarized as follows:

1. The Trial Court ordered that the cause be continued unless the testimony of the two absent witnesses, Willie Bevins and Ollie McClure, be admitted in evidence, but the Trial Court sat idly by and permitted the trial to be completed without the Appointed Attorney introducing such testimony in evidence and submitting it to the jury.

2. The Trial Court ruled that testimony concerning illegally seized monies was inadmissible. He then sat idly by while the State's Attorney took advantage of the Defendants by introducing evidence concerning such illegally seized monies, despite the Trial Court ruling, and the Trial Court did nothing when the Appointed Attorney failed to make any objection. The Supreme Court of Illinois then held because the Appointed Attorney failed to make any objection that it was too late to raise the question in that Court.

3. The Trial Court permitted two written statements to be introduced in evidence as confessions although there was no admission of guilt of the crime of Larceny contained in either of said statements, and then permitted Attorneys for the People to introduce oral testimony to impeach their own testimony in Chief, depending for a conviction on the resultant confusion in the minds of the jury, all of which was upheld by the Supreme Court of Illinois for the reason that the Appointed Attorney made no objection. The Supreme Court of Illinois in its decision (Opinion p. 5, Record pp.

9, 10, 11), based its affirmance on this improper testimony permitted in the evidence by the negligence of the Appointed Attorney.

4. The Trial Court permitted, and was upheld by the Supreme Court of the State of Illinois, the Appointed Attorney to conduct the trial while under the influence of intoxicating liquor, and in such condition, neglected and failed to defend Petitioners by following the plain, simple rules of procedure and substantive rights.

5. The Trial Court permitted, and the Supreme Court of the State of Illinois upheld, the act of permitting the Appointed Attorney to prepare and file the Motion for New Trial and Motion in Arrest of Judgment, after the Appointed Attorney had been removed from the Court room and confined in the County Jail for intoxication, and deprived the Petitioners of the right to have this conduct preserved in the Record, and the right to have accorded to them a trial according to due process of law in that the Appointed Attorney failed and refused to put in the Motion for New Trial objections to the acts and results of his own conduct.

These things are stated here without detailed references to the Record inasmuch as each fact has been herein at other places identified specifically in the Record.

IV

Specifications of Error

1. The Supreme Court of the State of Illinois erred in affirming the judgment, conviction and sentence of the Circuit Court of Saline County, Illinois.

2. The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Saline County, Illinois, in that the Circuit Court of Saline County, Illinois,

denied to the Petitioners due process of law, namely, the right to be represented by Counsel in reasonably defending themselves against the charge of the commission of a felony.

3. The Supreme Court of the State of Illinois erred in holding that it could not consider errors of a Trial Court not objected to at the time by Counsel appointed by the Trial Court to defend indigent Defendants, who by his own misconduct of intoxication committed in the presence of the Trial Court, deprived Petitioners of the right to have proper objections made and to have full and complete representation.

Argument

It is not the contention of the Petitioners that this Court should exercise its discretionary power and take jurisdiction of this case in order to determine or resolve any of the specific questions of law as held by the Supreme Court of the State of Illinois. It is the opinion of Petitioners that this Court should consider this cause because the events of the trial for which redress was denied in the Supreme Court of Illinois constituted a denial of their right to not have their liberty taken from them except by due process of law.

Petitioners respectfully contend that except for the specific identities and circumstances of the facts occurring in the trial, the instant case is precisely on the same plane and entails the same holding of this Court as in *Powell v. State of Alabama*, 287 U. S. 45, 53 S. Ct. 55, 65. Petitioners contend it is purely a question of whether a State Court may observe the empty formality of appointing Counsel in a felony case to defend an indigent Defendant, and then permit the Counsel so appointed to give to the Defendant no more than a perfunctory, negligent, careless, improper, and totally insufficient defense.

Although the Appointed Attorney for the Petitioners did not preserve in the Record any references or objection to the acts and effects of his own improper conduct, these acts appear affirmatively in the Record, and we contend that they show conclusively that Petitioners were denied due process of law.

When the Trial Court caused the Appointed Attorney to be removed from the Court room and incarcerated in the County Jail for drunken-ess during the trial, and then permitted that same Appointed Attorney to draw up, file, and argue the Motion for New Trial, without setting out his own improper conduct, there can be no doubt that the Petitioners were denied due process of law. These facts were in the Record (R. p. 15), and Petitioners set out this point before the Supreme Court of Illinois (R. p. 5), in an effort to secure the benefit of their constitutional right.

It is the contention of Petitioners that due process of law was denied them when the court permitted the State's Attorney to introduce evidence which the court had already ruled was improper and should not be admitted, when such acquiescence on the part of the court was merely because the Appointed Attorney made no objection.

It is the contention of the Petitioners that they were denied due process when the Trial Court ordered that the Affidavit containing the testimony of the absent witnesses, Willie Bevins and Ollie McClure, be admitted in evidence, and when it was not presented to the jury because the Attorney appointed by the court to defend these Petitioners did not offer it in evidence.

It is the contention of the Petitioners that they were denied due process of law when the Trial Court permitted the Appointed Attorney to call for the jury to be returned to open Court and hear improper evidence, in an erratic outburst following the Appointed Attorney's own request that the jury be excluded.

It is the contention of the Petitioners that they were denied due process of law when the Trial Court permitted Attorneys for the People to introduce oral testimony to impeach their own evidence in Chief merely because the Attorney the court had appointed to defend Petitioners did not raise his voice in objection.

It is the contention of Petitioners that they were denied due process when the Trial Court permitted the Attorney that had been appointed to defend them to make such omissions and commissions in trial procedure as to attempt to examine one of the People's witnesses in Chief when under cross-examination, and to submit the same instructions to be given to the jury in triplicate. Whether these latter two facts contributed materially to the conviction of the Petitioners, these facts certainly showed to the Trial Court beyond all doubt that their Appointed Attorney was intoxicated and was not properly defending the Petitioners and was not observing his duty and responsibility to the Court as well as to the Petitioners.

The Petitioners contend that they were denied due process for the reason that one is colored and one is white, and this is admitted by Attorneys for the People (R. p. 6), when in their appearance in the Supreme Court of Illinois they said that "We have no apology to offer for injecting this race question into the Record."

Petitioners contend that this Court has emphasized the fundamental necessity for the preservation of the constitutional right of liberty, and has said in *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 104, that "State action whether through one agency or another shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Petitioners contend that the Supreme Court of the State of Illinois erred in not preserving to them their right to

have their liberty unless deprived of it by due process of law. That same court, in the case of *People v. McGurn*, 341 Ill. 632, 638, has said that "A criminal may be forfeited his right to liberty, but he cannot legally be deprived of it except in accordance with the law of the land." That same court has said that where an Attorney appointed to defend is inexperienced, *People v. Winchester*, 352 Ill. 237, 185 N. E. 580, or where an Appointed Attorney is stupidly and obstinately recreant in performing his duty toward his client, *People v. Nutti*, 312 Ill. 73, 88, 89, 143 N. E. 448, that the Court would consider such conduct as grounds for reversal even though there was improper evidence admitted to which no objection was interposed at the Trial, *People v. Pierce*, 387 Ill. 608, 57 N. E. 2d 345, 348.

Petitioners respectfully insist that they were not accorded their constitutional rights and the fact that they were not accorded them, and the further fact that a complete and full record was not made of the events in the trial, was due solely and exclusively to the failure of the State Court to follow up its responsibility of appointing Counsel by insuring that such Counsel conducted himself properly and actually represented the Petitioners.

Petitioners contend that it is not sufficient observance of the Constitutional duty merely to appoint Counsel and then proceed in the conduct of the trial as though it were a game of wits between the People on one side represented by able Counsel, and the Defendants on the other side represented by incompetent and improper Counsel selected by the agency set up to guarantee due process. In these circumstances, Petitioners respectfully contend there could be no other result than that they be deprived of their liberty without due process of law.

Conclusion

Wherefore, it is respectfully submitted that the Petitioners have been aggrieved by the decision of the Supreme Court of the State of Illinois, and that this case should be certified to this Court for its review and determination.

Respectfully submitted,

SCERIAL THOMPSON,
Harrisburg National Bank Building,
Harrisburg, Illinois,
Attorney for Petitioners.

APPENDIX

Sec. 344, Title 28, U. S. C. A. (Judicial Code, Sec. 237).

Sub-section (b): It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a Statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

United States Constitution. Amendment XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Constitution. Article II. (Bill of Rights)

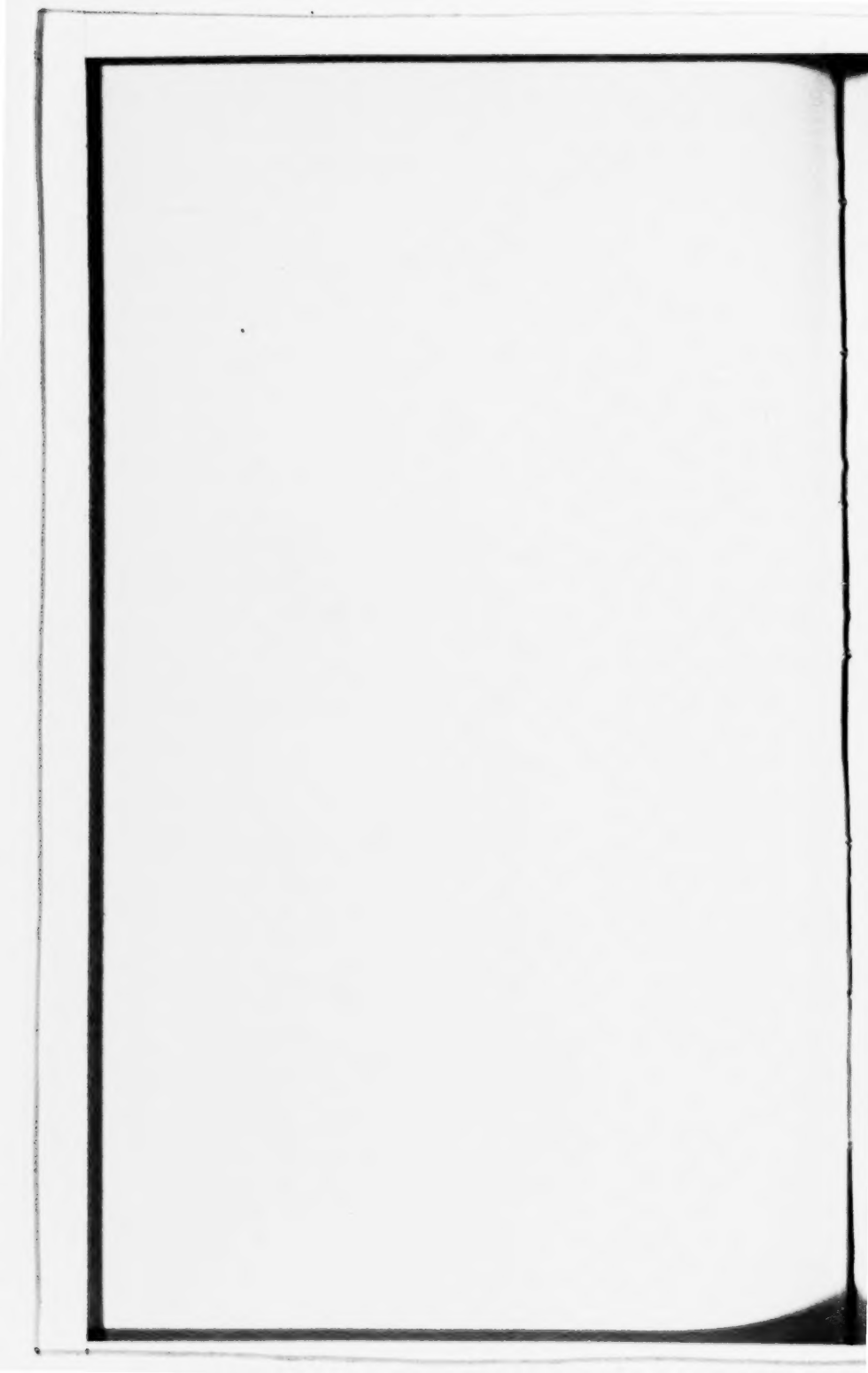
Par. 2. No person shall be deprived of life, liberty or property, without due process of law.

SUBJECT INDEX.

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IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1946.

No. 655

ARCHIE FINCH AND NANCY FINCH,
Petitioners,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS.

**BRIEF IN RESPONSE TO PETITION FOR WRIT
OF CERTIORARI.**

**RESPONDENT'S ADDITIONAL STATEMENT
OF THE CASE.**

Petitioners contend that they were denied that reasonably adequate representation by counsel which is of the essence of due process of law. To this end they ask this court to review the record of their trial and conviction,

"not" (in the language of their counsel at page 13 of petitioners' brief) "that this Court should exercise its discretionary power and take jurisdiction of this case in order to determine or resolve any of the specific questions of law as held by the Supreme Court of the State of Illinois" but with a view to ascertaining whether "the events of the trial for which redress was denied in the Supreme Court of Illinois constituted a denial of their right to not have their liberty taken from them except by due process of law."

It is their position that the record reflects such dereliction or recreancy on the part of the counsel whom the court appointed for them as will assimilate this case to those cases in which this court has said that ostensible representation by counsel was nothing more than a sham; and that therefore due process has been denied.

Unfortunately for petitioners, the record does not support their counsel's statements as to the facts. He states on page 4 of his petition, that "The Appointed Attorney sat mute" and permitted verbal allusion to be made, without objection, to money unlawfully seized when the bills themselves had been suppressed on a pre-trial motion. But the record contradicts petitioners' counsel. The full substance of the testimony *and of counsel's objection thereto* (which objection present counsel says was not made), is as follows (Tr. pp. 21-22):

"My name is Loran Travelstead, a Deputy Sheriff of Saline County since December 7, 1942. I know Archie Finch and Nancy Finch, and was one of the investigators of this larceny at Carrier Mills. I arrested Archie and Nancy Finch and placed them in jail. Two police from Carrier Mills were with me.

Q. Did you discover any money in the home of Archie and Nancy Finch?

A. Yes, sir.

Mr. Boswell: Object and ask again the exclusion of the Jury for the reasons that I have heretofore stated.

The Court: Overruled, the question is of what he found.

Mr. Boswell: You mean by an illegal search?

(Jury is excused out of hearing of the Court.)

The Court: Your motion at the beginning of the case was to suppress the actual production of the money.

Mr. Boswell: And also at that same time we asked that it be returned to us. The suppression of the amount and the kind they got because they never gave a description of it to us. It should have been given us, a description of the amount, the kind, and returned to us because it was gotten under illegal search and seizure, and you told me and the Court in the beginning.

The Court: There is no production of it yet. Hear it out of hearing of the jury."

Thus it appears that the court was apprised that the defendants contended not only that the money itself was inadmissible but that testimonial advertence might not be made to the fact of finding such money.

Petitioners' present counsel also says that petitioners' trial counsel was drunk at the time of the trial. But this fact does not appear in the record and petitioners' present counsel admitted as much in his petition for rehearing in the Supreme Court of Illinois. In his petition for rehearing (Tr. p. 75), petitioners' counsel says:

"The facts in this case are that the Appointed Attorney was drinking intoxicants all during the more than two day trial and this culminated at the time the verdict was returned in the Trial Court ordering the Appointed Attorney physically removed from the Court by the Sheriff and confined in the County Jail.

* * *

“When the Counsel presently appearing for Plaintiffs in Error began to prepare the record for this Court it was then too late to have the record show the true state of facts. * * *”

In the Argument, authorities are cited recognizing that in Illinois, as in courts of appellate review in virtually every other Anglo-American jurisdiction, on writs of error or appeal, only those errors will be considered that appear upon the record, including, of course, any duly approved bill of exceptions.

Petitioners' contention that their counsel himself elicited testimony to which he had objected on the ground that it was a confession and was not admissible without proof in the absence of the jury of its voluntary character is inconsistent with petitioners' contention that the statements in question were not confessions at all but exculpatory in tenor. In the Argument, it is shown that in Illinois a statement exculpatory in tenor may be admitted without proof that it is voluntary even though its effect is to contradict other statements of the defendant and thus its actual tendency is incriminatory rather than exculpatory. No suggestion is made that this rule *per se* denies due process.

Petitioners object that counsel was remiss in his duties because although he had procured a stipulation that absent witnesses named Willie Bevins and Ollie McClure would have testified to the matters set forth in an affidavit filed in support of a motion for a continuance, he did not use this affidavit in behalf of his clients on the trial.

It is contended in the Argument that it is obvious that while propounding the affidavit in the hope that the prosecution would not stipulate to its being read and that

therefore the defendants would receive a continuance might have been a reasonable stratagem, actual use of the affidavit would have done the defendants no good; for it would have been used only to impeach or discredit Guy Turner, from whom the money was stolen, by showing that he had been drinking heavily; and it does not appear that it cannot be presumed that the actual reading of this affidavit would have helped the petitioners. For aught that a court of review can say, the witnesses may have been of such unsavory repute in the community or of such discreditable countenance otherwise that it was wise to use an affidavit as to what they would say in the hope of getting a continuance when it would be very unwise actually to read the affidavit to a jury. Nor is there any suggestion that counsel did not have other reasons, perhaps discovered after he had made the motion for a continuance and procured a stipulation, for not using this affidavit.

QUESTION PRESENTED.

Is there manifest upon the record in its entirety conduct on the part of petitioners' trial counsel so remiss as to amount to a denial of due process of law?

A R G U M E N T .

I .

The contention that petitioners' counsel on the trial was so intoxicated that he could not adequately represent petitioners is not based upon matter in the record.

In respondent's Statement of the Case, *ante*, we called the court's attention to the confession of petitioners' present counsel, explicit in his petition for rehearing, that the alleged fact that petitioner's counsel was so intoxicated that he could not fairly represent his clients was not based upon the record.

In the Supreme Court of Illinois, as in nearly every other court of review, on writ of error or appeal, only such matter can be considered as appears in the record.*

Is, as petitioners contend, the trial court suffered petitioners' rights to be abandoned by a drunken lawyer and if that fact could not be made to appear by a transcript of the record, that fact could be made to appear to another judge by application for a writ of *habeas corpus* (not *coram nobis*), since presumably it could be matter within the trial court's knowledge.

In *Moore v. Dempsey*, 261 U.S. 86, this court held federal *habeas corpus* appropriate in a case where the matter al-

* The case of *Carter v. Illinois*, this court's present calendar No. 36, involves contentions interpolated by an indigent prisoner upon a common law record reviewed by the Supreme Court of Illinois on writ of error. In that case the Illinois practice is fully considered. Because counsel for petitioners in the instant case is presumably not aware that that case is now pending, the Attorney General will supply them with a copy of respondent's brief in the *Carter* case in order that, should he have occasion to file any further brief or other presentation in this court, he will be apprised that contentions pertinent to the instant case are now before the court in the *Carter* case.

leged as vitiating the trial was *dehors* the record, although it had denied *certiorari* to review a judgment of the Supreme Court of Arkansas affirming petitioner's conviction.

II.

Petitioners' other complaints are either not supported by the record or do not constitute denial of due process.

In respondent's Statement of the Case, *ante*, we demonstrated petitioners' present counsel's statement is not supported by the record in his statement that counsel on the trial acquiesced in verbal allusion to the finding of money on an illegal search, after the money itself, as physical evidence, had been suppressed by a pre-trial order. Therefore nothing more need be said in response to this contention.

Whether petitioners' counsel should put his clients on the stand and whether he should read to the jury an affidavit as to the testimony which absent witnesses would give were matters requiring professional discretion. Every lawyer experienced in the trial of criminal cases knows that there is frequently no problem of judgment more difficult of solution than that of whether to put an accused witness upon the stand, thereby exposing him to cross-examination and impeachment, or whether to allow him to remain mute. Nor is it an easy task to say whether the testimony of a witness, whether the witness be present or whether a substitute for his testimony be available in the form of an affidavit, should actually be used or not. Particularly in a small community, where prospective witnesses are known, it may be very bad judgment indeed to call such witnesses, even though their absence has been used in a vain effort to procure a continuance.

We earnestly emphasize the following consideration: If cases are to be reversed years later because defense counsel did not call a witness who presumably was available, a new and dangerous means of freeing desperate criminals has been invented. It is true that in *habeas corpus* or *coram nobis* the trial court may determine not only whether the witness was available, but whether failure to call him constituted such an abdication of counsel's responsibility as to deny due process. But petitioners would have this court declare categorically, upon a naked record that gives and can give none of the circumstances which may have prevailed upon defense counsel to forbear reading the affidavit, that such forbearance was an abandonment of his clients and worked a denial of due process.

Petitioners' present counsel also says that petitioners' trial counsel deprived them of due process when he himself elicited statements made by his clients that, according to petitioners' present counsel, should have been excluded as "confessions" unless a preliminary hearing outside the presence of the jury showed them to have been voluntarily made. But petitioner's counsel also contends that the statements did not amount to confessions because they did not show petitioners to be guilty of larceny. The fact is that they were exculpatory in intent and tenor, if not exculpatory in effect. The wisdom of eliciting them was a matter for the judgment of counsel.

In Illinois the rule is that, although confessions must be shown *prima facie* by proof outside the jury to have been voluntarily made statements made with exculpatory intent may be shown without such preliminary proof, even though the effect of such statements is actually to incriminate the accused (*People v. Wynekoop*, 359 Ill. 124).

The very fact that the State's attorney did not put these statements in evidence raises a strong inference that they

were favorable to the accused. But even if it should be conceded that petitioners' trial counsel was guilty of a serious mistake in judgment, that would not in itself deny due process. Finally, it must be remembered that Illinois observes the rule that cases will not be reversed where the proof of guilt is clear, even though error may have intervened at the trial. In the instant case, petitioners did not deny their guilt and the evidence showed them to have been in possession of the spoils of a larceny shortly after it occurred.

We submit that it was for the courts of Illinois, not for this court, to say whether the errors complained of were reversible; and that no question of the denial of federal due process is raised in the instant case.

Conclusion.

For the reasons urged in this brief, it is respectfully submitted that this court's writ of *certiorari* should be denied.

Respectfully submitted,

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